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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AVERY C. "PETE" MOORE

(PETITIONER)

VERSUS

STATE OF LOUISIANA

(RESPONDENT)

OPPOSITION BRIEF BY THE STATE OF LOUISIANA TO THE PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

EDWIN O. WARE, III
STATE OF LOUISIANA
DISTRICT ATTORNEY'S OFFICE
P. O. DRAWER 1472
ALEXANDRIA, LOUISIANA 71301
(318) 473-6650

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ARGUMENT

1. HYPNOSIS:

The Louisiana Supreme Court at 425 So.2d 759, (1983), affirmed the use at trial of a deputy sheriff-witness who had been hypnotized in order to help him recall the identification of an unidentified female passenger in a get-away vehicle inwhich the petitioner, Moore was operating. The vehicle was used in an armed robbery, kidnapping and murder. The State submits that the Court in this case and by reference and incorporation of the June, 1982 motion to suppress hearing in the co-defendant's case of State vs. Wren and Orlando, properly permitted the use of the testimony after complete examination of the facts in this case, the law of the sister States, and the general consensus of the approval of hypnosis in certain investigative positions.

In order to provide a synopsis of the case and the facts, it is necessary to retrace the history of the case. Here, a deputy sheriff-witness, who was on duty the night the body of the victim was found, passed in front of the store where the victim worked, and observed a vehicle parked in front of the doors of the store. The officer went next door and parked, and observed an individual, who he did not recognize, run from the door of the store and enter the back of the vehicle. He followed the vehicle, observed the license number, the make, color and model of the car, observed the driver of the vehicle, the petitioner, who he described in his statements as an elderly white male with receding hair-line and glasses. He also described and identified several of the other in-dividuals in the car, but was not able to identify the person in the middle of the back seat, and a person in the front passenger seat. He believed the per-son in the front passenger seat was a female because of the silhouette of the hairline in the lights. He followed the car, checked with other officers and received a computer record's check on the license plate. He found out that the

vehicle belonged to the petitioner, Avery C. "Pete" Moore, and was registered to a nearby city's address. Other officers found no one at the store, and no signs of struggle or other crimes, reported their findings to the deputy sheriff-witness, who subsequently broke off surveillance. Some thirty (30) minutes later, a phone call reported the discovery of a white male's body, dead, in the ditch on a rural road in Ball, Louisiana, just a few miles from the last spot where the deputy sheriff-witness observed the vehicle heading. The victim, was later identified as the store manager, was found to have been robbed of his pocketknife, his own personal hand-gun weapon that he carried in a blue cloth sack, and several hundred dollars in currency which he kept in his wallet. At the scene were tire impressions, which were cast in plaster and later compared with the tires found on the petitioner's vehicle and which were of a general match per expert criminalistics witness's testimony. At approximately 6:00 a.m. the next morning, the officer identified the photographs of both the petitioner, and the co-defendant, Vincent Orlando, the defendant's roommate.

Subsequent to that night and approximately two (2) weeks after the initial identification, the deputy sheriff-witness again identified the petitioner and his co-defendants in a photographic line-up held some two (2) months prior to any attempt to hypnotize him. In the identification session, he also gave a very detailed account of that evening's activity. The purpose of this subsequent hypnosis which occurred in March, 1981, was an attempt by the law enforcement officers still investigating the crime to help the deputy sheriff-witness recall the otherwise unidentified female who was seated in the getaway vehicle in the right passenger seat. Prior to the hypnosis, the deputy sheriff-witness again related to the people present at the hypnosis session of his identification of Moore, Orlando, and Wren, co-defendants in this case, and identified the vehicle and it's description with a summary of what happened that night.

The witness, then a deputy sheriff, now a Louisiana State Police trooper, has consistently identified the petitioner as the driver of the vehicle which was leaving the scene of the store, and nothing has ever been shown by any evidence that his identification was tampered or influenced or contaminated in any way, nor has there been any alternation or change in his memory or recollection or ability to testify.

A motion to suppress the testimony of the deputy sheriff-witness was held in the co-defendant's case, in June, 1982 before his honor Judge Alfred A. Mansour of the Ninth Judicial District Court. A copy of the Judge's ruling is attached hereto and made a part of this brief and is marked exhibit "A", and the Judge in his ruling did not suppress the testimony of the officer. The Louisiana Supreme Court affirmed the ruling of the trial Judge, and in the petitioner Moore's case, and the co-defendant's case, permitted the use of the deputy sheriff-witness to testify.

After being called back out, the deputy sheriff-witness identified co-defendant Wren as being present in the vehicle, and he has never changed his position that Wren was always in the vehicle. On that date, the witness also identified a picture of Orlando for the first time as the picture of the person who he observed locking up the door to the store, and then getting into the right rear seat of the vehicle. The officer also identified a picture of Moore as the driver. The witness' statement, which was transcribed, was provided to the defense counsel, and was introduced at the motion to suppress hearing in June, 1982, as Orlando-Wren I.

The witness' statement, Orlando-Wren I, is a running narrative by the witness and it indicated the time, place, the vehicle used, the manner in which the vehicle was parked, the parties and their actions as to what they were doing at the store and how they were observed to have left the store, the route that they took, the description of the occupants of the vehicle, with the driv-

er appearing to be an elderly white male with a receding hairline, wearing glasses (this description matches Avery C. "Pete" Moore) the unidentified passenger in the front seat appearing to be a woman with a short but full-type hairdo (which was the reason for the hypnosis) and in the rear of the car behind the driver, Tommy Wren, a white male known to the witness from a prior arrest. Also, the witness identified the license number of the vehicle that he was following, the radio operator that he radioed the information to, the information that he received back on the registration of the vehicle, it being registered to Avery C. Moore of Tioga, the route that he took after he broke off contact with the vehicle, and the fact that when he returned to the convenience store, actions that he took in checking the building, looking into the victim's car, etc. This statement was made on January 18, 1982, approximately two (2) months prior to any hypnosis.

In the statement, the deputy sheriff-witness initially identified the person locking the door and running, getting into the right rear seat of the vehicle as the person he knew to be Michael Ebey of the Tioga area. Later that morning, when he went to the residence of Ebey, and several hours after his first statement, the deputy sheriff-witness told the officers that his identification of Ebey was incorrect, and that the man that he saw locking the door of the store and running to get in the car as it was driving off was not Ebey. The officers did not arrest Ebey or Wren at that time, but merely asked them to come to the station and give statements as to where they had been that night and what they knew about this case. Wren was arrested after the Rapides Parish Grand Jury indicted him.

On January 29, 1981, the witness Vanderhoven was shown a photographic lineup with fifteen (15) photographs, and again, he identified Moore's picture as the driver of the vehicle, and Orlando's picture as the person in the right rear passenger seat, and Wren's photograph as the person in the left rear pas-

senger seat. This statement was also introduced at the June, 1982, motion to suppress, as Orlando-Wren 2, and in that statement, Deputy Vanderhoven also identified four (4) photographs of an automobile that he followed. The vehicle belongs to the petitioner, Moore. In Orlando-Wren 2, the witness identified the photograph of Tommy Wren, who he had both arrested once before, and had other dealings with, and stated that he was one-hundred percent positive that he was in the car the night that he followed the vehicle. Also, at page 3 of Orlando-Wren 2, Deputy Vanderhoven, the witness, stated there was no doubt whatsoever that the other people, Orlando and Moore, were in the vehicle, and he identified their place in the vehicle. In that statement, he also identified that there was someone else in the rear of that car, pushed down, and all that he could see was the top of the head. At that time, he was also asked to elaborate on the female in the right passenger seat, a white female with an upsweeping type hairdo, either light colored, frosted or blonde.

On March 6, 1981, the deputy sheriff-witness was hypnotized by Louisiana State Police Trooper Forest Kavanaugh for the purpose of determining who the female passenger was in the right front seat of the get-away vehicle. Petitioner, and co-defendant Orlando, were arrested two (2) days after the victim was found, prior to the hypnotic interview, Deputy Vanderhoven again related to the interviewer that he was able to identify the people in the car, without any hesitation or error. The purpose of the hypnotic session, as testified to by Deputy Vanderhoven and Deputy Hendricks, the investigating officer, was for the purpose of enhancing the witness' recollection as to the physical characteristics and identity of the female in the right front passenger seat.

Therefore, the deputy sheriff-witness, has identified the petitioner, Moore and co-defendant's, Orlando and Wren, on at least three (3) occasions prior to the hypnosis interview. In this case, no new information has been learned or discovered from hypnosis attempt, and nothing was either enhanced

or recalled through hypnosis.

The Louisiana Supreme Court at 425 So.2nd 759 (1983) followed other states in permitting the use of a witness to testify at trial after that witness had been hypnotized. In Commonwealth v. Taylor, 439 A.2d 805 (1982), the Court distinguished, Commonwealth v. Nazarovitch et al., ___Pa.____, 436 A.2d 170 (1981), the case submitted by the defense in support of their proposition that the witness' testimony should be held inadmissible. In Taylor, the defendants alleged that because the victim was hypnotized, her testimony was unreliable because there existed the potential for fantasy and confabulation. The Court disagreed, and permitted the witness to testify regarding pre-hypnosis recollection, and affirmed the judgment and sentence with respect to both defendants.

In Taylor, the Court stated that it was apparent that the witness had present recollection of the identity of her assailants, prior to the hypnotic session. Page 807. Under the circumstances of the case, the Court found that the testimony was admissible due to the fact that "she identified both appellants prior to the hypnotic session." Also, the victim had numerous opportunities to see both defendants, and she identified the photographs of the defendants from a series of photographs several weeks prior to the hypnotic session. In the case, the victim/witness also misidentified a second person in a line-up, and later identified the correct person. These details were brought to the jury's attention at the trial.

Quoting from the decision, the Court stated that:

> "Therefore, with respect to the victim's ability to identify her two (2) assailants, the hypnotic session did not, in fact refresh her memory and the dangers of unreliable suggestion, fantasy and confavulation are not at issue. . . . Therefore, the victim's testimony was not rendered incompetent by the hypnotic session due to the fact that she did have prior recollection."

In 1981, the Supreme Court of Minnesota in State v. Koehler, 312 N.W.2d 108, re-examined their original position stated in State v. Mack, 292 N.W.2d 764 (Minn.1980), and decided that the victim/witness could testify to matters which were "previously and unequivocally disclosed by him (the victim/witness) to the authorities, prior to the hypnosis." Emphasis and material in parenthesis is added.

In People v. Wallach, 312 N.W.2d 3(1981), the Michigan Court re-examined its holding in People v. Gonzales, 310 N.W.2d 306 (1981), wherein the Court held the witness whose memory had been "restored or created through hypnosis" could not testify about those incidents recalled only "under hypnosis." Distinguishing Gonzales, from the instant case, the deputy sheriff-witness was able to recall the defendants present at the scene of the murder and the fact that the defendant had been with the victim at a bar prior to hypnosis. The Court stated that it was proper for the Court to permit this testimony of matters which were recalled prior to the hypnosis session.

The Court also stated that the defendant's constitutional rights to confront and cross-examine the witness against him were not violated. The defendant's theory was that it would be impossible for a jury to assess the witness' creditability and demeanor after that witness had undergone hypnosis. Citing Diamond, Inherent Problems In the Use of Pre-Trial Hypnosis on a Perspective Witness, 68 Cal.L Rev. 313 (1980), the Court stated that they recognized that there may be some validity in Dr. Diamond's position that the witness's testimony has been "contaminated," however, the Court believed and ruled that a full cross-examination, in which defense counsel can question the previously hypnotized witness concerning the tentativeness of the recollection prior to the hypnosis, will largely alleviate the problem. The Court also permitted the defendant to introduce expert testimony at trial to detail the possibility that hypnotized witnesses might become subjectively more certain of events only

tentatively recalled or, indeed, recalled inaccurately.

In State v. Brown, ____N.W. 2d____, 33 CrL 2391, N.D.,(1983), the Supreme Court of North Dakota held that the pretrial hypnosis of a witness affects the credibility, but not the admissibility of the witness' testimony, rejecting a per se inadmissibility rule as too restrictive. The Court emphasized the factors that indicated reliability, including the training and experience of the hypnotist, the videotaping of the hypnotic session, the fact that the defense that the defense had pretrial notice of the hypnosis, the victim's opportunity to see the attacker, the thorough airing of the issue before the jury, and corroboration of the victim's identification through other evidence. The fact that the victim could not recall significant portions of the attack constituted a valid investigation purpose for hypnotizing and gave initial justification for reliance upon such evidence. In the case before the Court, the only thing that the officer could not recall was as to the unidentified female passenger in the car, not as to the petitioner or any of the other co-defendants.

Two other state Supreme Courts have dealt with the issue of admissibility of testimony by a witness who has been previously hypnotized can be found in Chapman v. State, 638 P.2d 1280 (Wyoming 1982) and Collins v. Superior Court of _____ Arizona _____, (Arizona, 1982), which may be found at 31 CrL. 2155 published in the Criminal Law Reporter, May 26, 1982.

In Chapman, the Wyoming Supreme Court stated that the defendant had had ample opportunity to test the credibility of the previously hypnotized witness to determine whether or not his recollection as to the identity of the defendant had been enhanced by the hypnotic session and, if so, whether such enhancement was only to the extent of a recall of his own memory or whether it included suggested items which were not part of the witness' own memory. The Court stated that the majority of the states are in accord with permitting the testimony of similar witnesses, with the right of the fact-finder to judge the

credibility of the witness on the basis of that information presented to the fact-finder concerning the effect of hypnosis, generally, and the effect of hypnosis in the specific case. Also, the Wyoming Supreme Court stated that there was no need for a strict foundation or requirements such as the New Jersey Supreme Court adopted in State v. Hurd, 432 A.2d 86, 29 Cr.L. 2398 (1981).

In the Arizona Supreme Court case of Collins v. Superior Court, the Court overruled their previous holding in State v. Mena, 128 Arizona 226 (1981). The Court stated that the benefits of hypnosis as an investigatory tool outweighs the dangers, and found that hypnosis is generally accepted as a reliable investigative tool by the scientific community. That Court held that a witness was not rendered incompetent to testify merely because he or she was hypnotized during the investigatory phase of the case, and the witness would be permitted to testify with regard to those matters which he or she was able to recall and relate to prior to hypnosis. The Court stated that some of the risks may be mininized by allowing cross-examination of the previously hypnotized witness in order to permit the opposing party to establish a fact of hypnosis and to introduce expert evidence showing the possibility the witness might be becoming subjectively certain of events only tentatively recalled before hypnosis.

In the instant case on appeal, the officer's identification of the defendant was certain and positive, and his recollection as to the defendants' identity was neither enhanced nor aided in any way by the hypnosis.

Virtually all of the cases prohibiting the use of hypnosis have different factual situations in which hypnosis was used to determine if a crime had occurred, and, if so, who the defendant was. In most of the cases, it was only after hypnosis suggested the answers through the officer's questions, that the victim "remembers" under hypnosis, either the crime has occurred

or the identification of the person that is made. In State v. Hurd, supra, the victim was unable or unwilling to describe her assailant to the officers at the hospital emergency room. It was only after she was placed under hypnosis that she responded to the questions from the officers, and only then did she state that it was the defendant who attacked her.

In State v. Mack, 292 N.W.Rep.2d 764 (Minn. 1980), the victim was described as "quite drunk" and originally insisted that the injuries that she had received were not the defendant's fault. She originally indicated to the officers that she had been injured in a motorcycle accident, and it was not until two (2) days later that she told police that she had been assaulted. Also, she indicated to the police that she had been suffering emotional problems, due to a serious relationship with a man that had recently ended, and that she had "blacked out" from drinking on other occasions. Subsequently, six (6) weeks later, the officers induced hypnosis with a standard procedure, and only then did she state that the defendant had pulled out a switchblade knife and tried to kill her for running out on the defendant.

The Supreme Court in that case stated that hypnotically induced evidence can create a problem of perceptions which neither were nor could have been made, and the Courts also stated that the circumstances presented by the case before them are "most suspect." Obviously, the Court was worried about a witness-victim, who herself was very suspect, and was unable to make a determination that a crime had occurred, or identify that a person had committed the crime.

In the recent California case of People v. Shirley, _____P.2d_____ (Cal. 1982), a "victim" was hypnotized in order to determine what had happened in this rape and sexual crime case. The case was a "one-on-one" crime, with no other witnesses. The Supreme Court stated that the victim-witness' testimony is "replete with doubt, with her testimony being vague, changeable, self-contradictory, or prone to unexplained lapses of memory." The victim was a

bartender at a saloon, and on the date of the offense, was off-duty and "feeling kind of bad." She was under the influence of alcohol and staggered when she walked. The defendant offered to take her to get something to eat and then home. The defendant readily admits taking her home and stated that they entered into a consentual act of sexual intercourse, whereas the victim testified that it was only through force and threats that she submitted, and was compelled to have sex with the defendant. According to the witness, before being hypnotized she could only "vaguely" recall what had happened during the evening and stated that the hypnosis helped her to "fill in the gaps" in her memory. Suppression of this witness's testimony was proper on the facts of the case.

At page 5 of the defense brief, counsel cites People v. Tait, wherein the Michigan appeals court reversed the defendant's assault case because of the admission of testimony of the victim of the alleged assault who was hypnotized prior to trial. The Court did reverse the conviction, but the reversal was due to the fact that the prosecution had not informed defense counsel of the deputy sheriff witness' memory having been refreshed by hypnosis, and the jury was never informed that the witness' memory had been refreshed through hypnosis. Also, the trial court ordered both counsels not to refer to hypnosis in the jury's presence and refused to give defendant's requested instructions on the fact of hypnosis. It is true that the Court did state that the use of hypnosis on persons carries a "dangerous potential for abuse" but, the Court stated that the abuse can be reduced to a minimum by (1) keeping complete records of the interviews of the persons who are hypnotized, (2) the judge, jury and opponent should know who was present, and (3) they should be informed of the questions that were asked and the witness' response. Therefore, Tait was reversed on procedural grounds, and not on the issue of hypnosis in general

In the instant case, Deputy Vanderhoven's previous identifications and

statements do not contain the suggestibility or inherent dangers which were present in the other cases which prohibited the use of hypnotically refreshed testimony. In this case, the officer made a narrative statement on January 18, 1981, a few hours after observing the defendants' vehicle at the convenience store; also, the witness gave a question and answer interview on January 29, 1981, when he was shown several photographs to identify, and then on March 6, 1981, prior to being hypnotized, the witness again related the essential details of the crime, and the participants, to the interviewer.

Deputy Vanderhoven was called by the co-defendants, Wren and Orlando at the motion to suppress June, 1982 hearing, and beginning at page 5 of the transcript and continuing, the witness related to the Court his investigation on the night of the abduction and murder, January 17, 1981. In his testimony, he related that he first observed seeing an automobile parked parallel to the store at approximately 10:15 p.m. It is imperative that this Court review that transcript to see the background and reasons why the trial and Supreme Court reached their opinion. At page 6 of the transcript, and later at page 9 of the transcript, the witness identified both defendants as being at the store, or in the vehicle, while he watched the scene, and then followed the vehicle. Not knowing that an armed robbery and abduction were happening, the deputy followed the vehicle for a short while, ran a registration check of the vehicle, and determined from other officers that everything at the scene of the convenience store appeared normal, before breaking off the surveillance. During this surveillance, the witness followed the vehicle at a close distance and observed the people inside for several minutes, concentrating on the identity of the occupants. It was subsequent to this investigation that the body of the store manager was found a short distance down the road from where the officer last had the vehicle under surveillance. The officer-witness returned to the scene of the investigation and gave a statement to the police which was pro-

vided to defense counsel, and which was introduced at the motion to suppress that he showed two (2) photographs of the defendants Orlando and Moore to the witness Vanderhoven at approximatley 6:00 a.m. on January 18, 1981, several hours after the witness had given a narrative statement. Page 60, transcript of motion to suppress. Deputy Richard stated that "it was a very brief contact with him", and stated that there were a lot of people engaged in the investigation of this heinous crime at that time of the morning, and that the conversation with the detective was for a very brief period of time. Also, Deputy Richard stated that he did not make any record of the conversation in the police reports.

At the motion to suppress in June, 1982, Deputy Vanderhoven stated that he had no recollection of a photographic display with the pictures of the defendants that were shown to him on January 18, 1981 or March 6, 1981. Dr. Diamond testified that this lack of recall is caused by "source amnesia", a condition caused by hypnosis. It is noteworthy that Dr. Diamond explains the effects of the amnesia on the hypnosis, but he is unable to explain why neither Trooper Kavanaugh nor Detective Hendricks recalled seeing or showing the fifteen photographs to the witness at the conclusion of the hypnotic interview. Obviously, Dr. Diamond attempts to bolster his position that hypnosis caused the "source amnesia", but he is unable to explain in his testimony why Kavanaugh and Hendricks both also forgot the fifteen (15) photographs being shown to the witness.

The failings of human memory are nothing new to any of the members of the Court, and everyone is familiar with the effect of the passage of time on the ability of a person to recall what happened at one specific moment. The officers, including Deputy Vanderhoven, merely forgot the pictures had been displayed.

Dr. Diamond also stated under oath that nothing new was elicited from

the witness Vanderhoven through the use of hypnosis. Vanderhoven was able to recall before the hypnosis interview everything in the case. Dr. Diamond stated that in the majority of cases, nothing new comes up through the hypnosis interview.

At page 183 of the transcript of motion of suppress, Dr. Diamond stated that:

> "the major effect of hypnosis is of coaching the witness, so that one changes the witness who might have been uncertain or applied self-criticism, who is hesitant, and the like, into a very self-confident, and I might say a very impressive witness."

Later, Dr. Diamond stated that:

> "a witness can be coached in other ways to repeating interragation and the like, and lineups and photographic lineups and the risk, can amount to. . .uh. . coaching witness. . .that can in some instances be as serious as hypnosis."

Dr. Diamond also stated that all of the works that he used as authorities in presenting his views of the effects of hypnosis on a witness, were based on eye-witness testimony testing, and not from any results from testing done on witnesses who had been hypnotized. Dr. Diamond, also at page 186 of the transcript, stated that he was very troubled with the reliability of eye-witness testimony and identification and stated that there are serious problems with the reliability of eye-witness identifications.

The burden of proof in this case was on the defendants, and the State submits that the defendants have not met the burden of proof through either the decisions in other jurisdictions, the medical evidence, or the factual showing required in a motion to suppress. Their own doctor stated that nothing new was obtained in this case, and that the most serious problem in this case would be the coaching of a witness, which could be caused in

other ways such as through repeated interrogations, line-ups, and reveiwing the case with the witness.

Judge Alfred Mansour in his written reasons, a copy attached hereto and made a part of this brief, for denying the motion to suppress, heard and saw all of the witnesses, and at page 3 of his written reasons stated that:

> "However, it should be stated for record that the Court observed this witness to be straightforward and direct. He tesified on direct and cross-examination as one would expect an officer of the law with nine years of experience to testify. . .
>
> The defense, showing its potential contamination, seeks to suppress Deputy Vanderhoveh's testimony under the Fifth Amendment right to confront a cross-examined witnesses.
>
> Nevertheless, I believe this to be a fact issue that should be presented to the trier of fact as to the weight and sufficiency of the evidence. It should not be disposed of by some blank and exclusionary rule under admissibility of evidence."

The factual background of this case differs very definitely from the cases cited by the defense attorney in his brief from sister jurisdictions who have prohibited hypnotized witnesses from thereafter testifying. The State submits that this case shows a complete and independent basis for the admission of Deputy Vanderhoven's testimony, due to his previously having on several different occasions identified the defendants Orlando, Wren and Moore. Likewise, his statements to the police, and his testimony, have all been provided to the defense counsel and are subject to use by them for the purpose of their cross-examinations and informing the trier of the fact of the hypnosis issue, and any effect which may have occurred on the witness. Finally, in the following cases, the Courts in different jurisdictions have permitted the use of the of the testimony of a person who has been hypnotized. Clark v. State,

379 So.2d 372 (1979), U. S. v. Awkard, 597 F.2d 667, People v. Smrekar, 385 N.E.2d 848 (Ill.1979), State v. McQueen, 244 S.E.2d 414 (S.Ct. of N.C. 1978) and Creamer v. State, 205 S.E.2d 240 (Ga. S.Ct. 1970) and finally, State v. JOrgesen, 492 P.2d 312 (App. 1971).

In Clark, the Court stated that the United States Court of Appeals, Ninth Circuit, in Kline v. Ford Motor Company, Inc., 523 F.2d 1067, permitted the witness to testify as to events that were personally heard and seen at the time, and that the witness was testifying about present recollection of events that she had witnessed. The Court stated that the circumstance that witness was hypnotized prior to trial would only affect "the credibility of the testimony concerning the occurances, but would not render the testimony incompetent."

In Awkard, the Ninth Circuit U. S. Court of Appeals, in 1979, stated that "the use of hypnotically induced evidence has gained acceptance in many jurisdictions". Pre-trial hypnosis of witnesses is permitted in that circuit in both criminal and civil cases. The fact of hypnosis, if disclosed to the jury, may effect the credibility of evidence, but not its admissibility.

In Smrekar, the Court in 1979 in Illinois, stated that:

> "when a witness is capable of giving testimony having some probative value, the witness is permitted to testify with evidence of impairment of the ability of the witness to accurately recall evidence or that suggestive material has been used to refresh the witness' recollection, goes only to the weight to be given to the testimony of the witness." Page 853

The Court permitted the testimony of the witness identifying the defendant as the person she saw at the scene of the crime, and stated that the evidence showed that at the time of the occurrence, the witness had ample opportunity to view him.

The Court stated that:

> "We consider this testimony to have been an aid to the trier of fact in arriving at the truth and to have been properly admitted." Page 855

In McQueen, the Supreme Court of North Carolina stated that the circumstance that the witness was hypnotized prior to trial will affect only the credibility of her testimony concerning the occurrences at the home where at the time when two (2) people were killed, and "would not render the testimony incompetent." Page 427.

In Creamer, the Supreme Court of Georgia, stated that the evidence disclosed that the victim related to the authorities the principle facts and details of the crime prior to being hypnotized, and that since both counsel are experienced advocates who can vigorously and competently cross-examine extensively and thoroughly the victim, the fact that the victim was placed under hypnosis, and the purpose therefore, can clearly be made to the jury. The Court stated that the victim could testify before the jury.

The Louisiana Supreme Court in its decision of the entire motion to suppress hearing in the co-defendants' motion to suppress hearing agreed with the State's assessment that other states which have prohibited the testimony of a witness who has been previously hypnotized where distinguishable from the present case. The Louisiana Supreme Court held that the "issue of Vanderhoven's hypnosis should go to the question of the proper weight to be accorded his testimony rather than the question of its admissible." The Court agreed that a skillful cross-examination would enable the trier of fact the effect of hypnosis on Vanderhoven's credibility. Additionally, since Vanderhoven's first two (2) statements provided an independent basis for corrobaration of his hypnotic and post-hypnotic statements and identification, any of the feared risk of "confabulation" and undo suggestion become insignificant. The Supreme

Court affirmed the use of Deputy Vanderhoven as a witness in the Wren and Orlando trial. In petitioner's appeal, at the oral argument, the defense counsel was specifically asked by a member of the Court from the bench as to whether there were any facts present in the petitioner's case which might distinguish it from the co-defendants case of Wren and Orlando which had been decided in January 10th, 1983. At footnote 6 in that opinion from the Louisiana Supreme Court, the Court noted that the counsel was asked whether during trial if the witness deputy sheriff had testified as to any facts that had been hypnotically - induced, i.e., had the hypnosis caused him to testify to any facts which were unknown before he had been hypnotized. Counsel, replied with an unequivocal, "no.".

The State submits that the trial court's decision, and the decision by the Louisiana Supreme Court in this case and the co-defendants' case, are proper, and that the defendants have not been denied any Fifth Amendment Confrontation Rights.

2. DISPROPORTIONALITY OF CRUEL AND UNUSUAL PUNISHMENT

and

3. CIRCUMSTANTIAL EVIDENCE AS TO EQUAL PROTECTION UNDER THE LAW

At page 285 of the trial record, presiding Judge Jules Davidson, in his per curiam to the assignments of error filed by defendant, stated that, "There is ample evidence to link Mr. Moore with this crime and to support the jury's recommendation of death."

Also, in the uniform capital sentence report filed on April 23, 1982 by Judge Davidson, page 5(b), the Court stated that:

> "Mr. Austin was killed by Mr. Moore and others, who had been planning Mr. Austin's demise for at least two (2) weeks. This murder was carried out in the cold, calculated fashion solely for the purpose of robbing the defendant (sic). By this murder and the murder of his wife in 1967, Mr. Moore has demonstrated his complete lack of respect for any human life other than his own. This Court finds it significant that Mr. Moore committed this murder within two (2) years of his release from Angola, where he was being held because of the killing of his wife. This is the only appropriate sentence in this case." (Emphasis Added)

The State incorporates by reference the uniform capital sentence report filed in connection with the death penalty imposed in this case, and also by reference, adopts the position of the State in the State's Sentence Review Memorandum, pursuant to Rule 905.1, filed on September 7, 1982 in the Louisiana Supreme Court. In that memorandum, the State explored the facts of the case and the background of the defendant. The memorandum showed that the evidence supported the jury's finding of guilt, and the jury's finding of a statutory aggravating circumstance. Finally, the State submits that the sentence of death is the only appropriate sentence to impose in this case, considering the

background of the defendant, and the nature of the crime.

The defendant in his brief cited the United States Supreme Court case of Enmund v. Florida, U. S. Docket No. 81-5321 (1982)_____U.S._____. This case is not applicable to the case before the Court. In the Enmund decision, the Supreme Court held that the record did not show that the defendant had the necessary intent to kill the victim, nor did he kill the victim. Therefore, the Court ruled it was impermissible for the State to treat a robber the same as a person who was the actual murderer of the victim. The death penalty is not a valid penalty under the Eighth and Fourteenth Amendments to the United States Constitution "for one who neither took life, attempted to take life, nor intended to take life." A defendant's intentions, and therefore his moral guilt is critical to the degree of his criminal culpability.

In this instant case, the State showed through overwhelming evidence that this defendant actively planned, conspired, and intended for the death of the victim to occur. This was shown through the testimony of Margaret Weems, the great niece of the accused, who testified that approximately two (2) weeks prior to the murder, the defendant had stated that "he ought to rob the man (the victim), shoot him in the back and dump him in the ditch."

The Louisiana Supreme Court in its decision in affirming the conviction and sentence of the defendant-petitioner stated that "here, the evidence against the defendant, albeit circumstantial, is overwhelming.[8]" The Louisiana Supreme Court reviewed the evidence beginning with Margaret Weems, the petitioner-defendant's niece, who testified that as much as a week to ten (10) days prior to the murder, the petitioner was talking about robbing the victim, shooting him in the back, and throwing him in a roadside ditch. The witness and her son testified that the defendant owned a .380 caliber pistol, that the defendant-petitioner and co-defendant, Vincent Orlando visted the household and gave to the witnesses two (2) pistols to hold for them while they

were at the house and that they took the pistols with them when they left the next day from her home, approximately ten (10) days before the actual abduction, robbery and murder. Also, the witness, the niece of the petitioner testified that when she informed the petitioner that he was being sought in connection with the murder, the petitioner stated "the old S.O.B. is dead and there isn't any witnesses." Mrs. Weems also testified that the defendant-petitioner told her that "there weren't any women involved" when she told him that her child had advised her that the police might want to question her about the incident.

The Court also considered the statement of Ralph Guy, Linda Reed's ex-boyfriend, who testified that the defendant was supposed to have been baby-sitting Linda's three (3) children at her residence from about 4:00 p.m. on the evening of the murder, but that the defendant was not there when he went to the residence between midnight and 1:00 a.m. Guy received several calls from the children earlier in the evening. Mrs. Weems testified that she had been calling the residence from about 6:00 p.m. to 9:00 p.m. on the night of the murder looking for the defendant, last trying at 9:09 p.m., but "it was a kid kept answering the phone." She finally reached the defendant at about 4:00 a.m., and she testified that he said he "had just come in . . . (from) out trying to score some money." Mrs. Weems testified that it usually took about four hours to drive from Tioga to Houston.

Also, Earnest O'Dell, a disc jockey at a Houston nightclub, testified that he was approached at the club by the petitioner and Vincent Orlando, the night after the murder, and the petitioner told him to tell the police that he (Moore) had been in the club on the night of the incident because they were trying to "pin a rap on him" for a murder in Louisiana. O'Dell's testimony was corrobarated by the club's owner, Robert Fields, who testified that he had seen the defendant and Orlando approach O'Dell at the club on the night following the killing. Laura Simms, a dancer at the club, testified that she

was also approached by the two and that the defendant told her not to say anything about his presence in Louisiana on the night of the murder.

Mrs. Austin, the victim's wife, testified that her husband had told her about a week before the murder that Michael Ebey had told him that there might be a robbery attempt at the store. Ebey testified that he learned of the defendant's plan to rob and murder the victim a few days prior to the incident from Mrs. Weems daughter, Karen. Mrs. Austin accounted for her husband's possessions as he had carried with him $230. in cash (which was to be deposited in their savings account on Monday), a .38 caliber pistol, a pocketknife, and the combination to the store safe. These items were missing from Austin's body.

James Milligan, the last customer to see the victim alive, testified that he left the store just minutes after closing time and observed the defendant's vechicle to the left side of the store, out of view from anyone inside, at approximately 10:00 p.m. the night of the victim's abduction, robbery and murder. At trial, he identified photographs of the defendant's car as the vehicle he had seen beside the store.

Deputy Vanderhoven gave extensive testimony concerning his observations on the night of the incident and made a positive in-court identification of the defendant as the driver of the vehicle.

Larry Craven, who lived approximately 100 yards from where the victim's body was found testified that he heard a single gunshot at about 10:30 p.m. on the night of the murder.

Raymond Cooper, a criminalistics expert, testified that plaster casts of tire imprints found near the body matched by class characteristics the tires on the defendant's vehicle.

The Court concluded, after viewing this great body of evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of the crime proved beyond a reason-

able doubt. The evidence is uncontroverted that the victim was robbed of his valuables at gunpoint and shot to death. Specific intent may be inferred from the circumstances of the transaction. LSA-R.S. 15:455; State v. Motton, 395 So.2d 1337 (La. 1981). Given the extensive testimony concerning the petitioner's prior threats to rob and kill the victim, any rational trier of fact could have concluded that the defendant shot the victim with specific intent to kill while engaged in the prepetration of an armed robbery.

In the instant case, the State showed through overwhelming evidence that this defendant actively planned, conspired, and intended for the death of the death victim to occur. In footnote 9 of petitioner's appeal in the opinion the Louisiana Supreme Court noted that the defendant even if he did not fire the fatal shot, the petitioner was clearly a principle who shared with the actual killer the specific intent to kill the victim. Even if another of the occupants actually pulled the trigger, the evidence adduced at trial was such that any rational trier of fact could have concluded that the defendant had the specific intent to rob and kill the victim. He was therefore properly convicted of first degree murder".

CONCLUSION

The State prays that this honorable Court deny issuing a Writ of Certiorari, and affirm the action taken by the honorable Louisiana Supreme Court.

Respectfully Submitted;

STATE OF LOUISIANA

BY: Edwin O. Ware III

EDWIN O. WARE, III
District Attorney
P. O. Drawer 1472
Alexandria, Louisiana 71301
(318) 473-6650

CERTIFICATE OF SERVICE AND MAILING

I, Edwin O. Ware, III, a member in good standing of the Bar of the Unites States Supreme Court, do hereby certify that:

1.

The above and foregoing Opposition Brief by the State of Louisiana to the Petition for Writ of Certiorari to the Louisiana Supreme Court has this 24th day of October, 1983, been served to the following:

1. Mr. Steven Everett
   Attorney for Petitioner
   P. O. Box 1842
   Alexandria, Louisiana 71301

2. Mr. Alexander L. Stevas
   Clerk
   Supreme Court of the United States
   Washington, D.C. 20543

by depositing the above with the United States Mail, postage prepaid on this 24th day of October, 1983.

Alexandria, Louisiana, this 24th day of October, 1983.

Edwin O. Ware III

EDWIN O. WARE, III

CRIMINAL DOCKET NUMBERS 200,647-B & 200,648-B

STATE OF LOUISIANA — NINTH JUDICIAL DISTRICT COURT

VS. — PARISH OF RAPIDES

VINCENT ORLANDO — STATE OF LOUISIANA

CONSOLIDATED WITH

CRIMINAL DOCKET NUMBERS 200,647 & 200,648

STATE OF LOUISIANA — NINTH JUDICIAL DISTRICT COURT

VS. — PARISH OF RAPIDES

TOMMY WREN — STATE OF LOUISIANA

REASONS FOR DENIAL OF MOTION TO SUPPRESS

At issue before the Court in this motion to suppress is the effect of the use of hypnosis on a witness by criminal investigators in their attempt to ascertain information prior to that witness's testimony at trial. This is a res nova issue in the State of Louisiana.

Deputy Bruce Vanderhoven witnessed the abduction of the victim of an armed robbery and murder from his sheriff's cruiser, but was not aware that a crime was in progress.

Immediately upon learning of the crime Deputy Vanderhoven gave sheriff's investigators a detailed description of two of the subjects involved. He mistakenly identified one of these two subjects as Michael Ebey, but upon later seeing Ebey with facial hair and walking with the aid of crutches he retracted that statement.

He identified another suspect as Tommy Wren, Michael Ebey's roommate. Mr. Wren was known to Deputy Vanderhoven because of a prior arrest.

A fourth subject observed by Deputy Vanderhoven, other than the victim, remains an unidentified female.

Deputy Vanderhoven later changed his identification of the man he believed to be Michael Ebey to Vincent Orlando after being shown photos in a police photo lineup. He also identified photos of Avery C. "Pete" Moore as the man driving the car used in the crime.

Thus, Deputy Vanderhoven made positive identification of Avery C. "Pete" Moore, Vincent Orlando and Tommy Wren prior to the hypnotic session.

The criminal investigators attempted to identify the unknown female accomplice by hypnotizing Vanderhoven. The purpose of the hypnosis was solely to identify the female subject in the car.

The hypnotic session did not raise any new evidence from Deputy Vanderhoven's memory. The female subject remained unidentified.

Defense expert Dr. Bernard Diamond explained in great depth the effect that post hypnotic suggestion can have on a witness's ability to use his critical judgment during his testimony at trial. He said that this effect would make it virtually impossible for a witness to be meaningfully cross-examined.

Dr. Diamond suggests that once hypnosis has occurred the dichotomy between independent memory and hypnotic suggestion no longer exists.

In analyzing Deputy Vanderhoven's testimony at the hearing, Dr. Diamond stated that at one point he felt that Deputy Vanderhoven may have momentarily slipped back into the hypnotic trance. Admittedly the Court is not trained to detect such an occurrence by way of voice fluctuation, etc., so the Court can make no determination on this point.

However, it should be stated for the record that the Court observed this witness to be straightforward and direct. He testified under direct and cross-examination the way one would expect an officer of the law with nine years of experience to testify.

The defense, by showing this potential contamination, seeks to suppress Deputy Vanderhoven's testimony under the Fifth Amendment right to confront and cross-examine witnesses.

Nevertheless, I believe this to be a fact issue that should be presented to the trier of fact as to the weight and sufficiency of the evidence. It should not be disposed of by some blanket exclusionary rule on admissibility of evidence.

For the foregoing reasons the motion to suppress is denied.

Alexandria, Louisiana, this 7th day of July, 1982.

Alfred A. Mansour

ALFRED A. MANSOUR
District Judge
Division "A"

82 JUL 7 P3:34

CLERK & RECORDER
RAPIDES PARISH, LA.

Exhibit "A"
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